

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs November 29, 2005

STATE OF TENNESSEE v. DAVID WAYNE BERNARD

**Direct Appeal from the Criminal Court for Greene County
No. 04CR192 James Edward Beckner, Judge**

No. E2005-00852-CCA-R3-CD - Filed April 21, 2006

Following a jury trial in Greene County, Defendant, David Wayne Bernard, was found guilty of possession of more than one-half ounce of marijuana with intent to deliver, and possession of a deadly weapon (a .357 caliber Ruger revolver) with the intent to employ it in the commission of an offense. Both offenses are Class E felonies. The trial court ordered Defendant to serve two years for each conviction, concurrently with each other. Defendant's only issue on appeal is a challenge to the sufficiency of the evidence to support both convictions. We affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JOSEPH M. TIPTON, J., joined.

R. B. Baird, III, Rogersville, Tennessee, for the appellant, David Wayne Bernard.

Paul G. Summers, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; C. Berkeley Bell, Jr., District Attorney General; and Cecil Clayton Mills, Jr., Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. State's Proof

In the early morning hours of Saturday, June 26, 2004, Officer Jimmy Willett of the Baileyton Police Department, accompanied by reserve Officer J. D. Sensabaugh, stopped the vehicle Defendant was driving because Defendant was "paced" driving 50 miles per hour in a 30-mile-per-hour zone. Officer Willett asked Defendant for his driver's license, car registration, and proof of insurance. Defendant responded that his driver's license was revoked. Officer Willett arrested Defendant for driving on a revoked license and placed Defendant into the backseat of the patrol car. A certified copy of Defendant's driving record showed his license was indeed revoked on June 26,

2004. Defendant acknowledged that he was the owner of the vehicle he was driving. Officer Willett asked Defendant if he had a preference for which wrecker service would be called to tow his vehicle. According to Willett, Defendant “acted very nervous” and stated that he would prefer for a friend to come and drive the car away. Officer Willett explained that police department policy required a wrecker service to tow the vehicle. He also asked Defendant if he could search Defendant’s vehicle. Defendant replied that he did not want anyone looking inside his vehicle.

Officer Jason Taylor, a “canine” officer with the Greene County Sheriff’s Department, was called to the scene. After arriving about ten minutes later, Officer Taylor was briefed by Officer Willett. Officer Taylor’s dog, “Bass” was put to work and promptly gave a “positive alert” on the trunk of Defendant’s vehicle. Taylor retrieved the car keys from the ignition and opened the trunk. The spare tire was lying in the trunk. On top of the wheel of the spare tire and in plain sight was a plastic bag of marijuana, a loaded .357 caliber Ruger revolver, a box of Sudafed, and a box of Equate brand suphedrine. “Bass” then gave a positive alert to the front passenger door of Defendant’s vehicle. Two more plastic bags of marijuana were found in the glove compartment.

The revolver was lying directly next to the bag of marijuana found in the trunk. A Tennessee Bureau of Investigation (T.B.I.) forensic scientist testified at trial that the bag in the trunk contained 389.8 grams of marijuana, and that the combined weight of the marijuana in the smaller bags in the glove compartment was 55.3 grams, for a total of approximately 445 grams of marijuana (a little less than one pound) discovered inside Defendant’s vehicle. There was no cash, and no scales, logbooks, written records of sales, empty baggies, or other drug paraphernalia found inside Defendant’s car.

II. Defendant’s Proof

T.B.I. forensic latent fingerprint examiner, Hoyt Phillips, examined the three plastic bags which contained the marijuana. One latent print was discovered on the bag found in the trunk of Defendant’s vehicle. Phillips compared this latent print with Defendant’s fingerprints, and excluded Defendant as the person who left the latent print. Also, a computer check of the T.B.I.’s database, containing approximately one million fingerprints, failed to result in any match. No latent fingerprints were found on either of the two bags found in the glove compartment. Phillips could not determine when the unknown latent print was left on the bag, and the result of his examination could not conclude that Defendant had never handled any of the three bags.

Adam Bernard, Defendant’s twenty-one-year-old son, observed his father sell the subject vehicle to two Hispanic men about a week prior to Defendant’s arrest. The purchasers paid \$1,000.00 down on the agreed price of \$1,500.00, and they left with the vehicle, to return within a week to pay the balance of \$500.00. At approximately 10:30 p.m. on June 25, a few hours before Defendant’s arrest, Adam went to Defendant’s truck and car repair garage to check on his own truck. He saw the vehicle previously sold by his father parked at the garage. The purchasers were not at the premises. Adam drove to Defendant’s house and then drove Defendant to the garage where he let Defendant out, and then proceeded to drive to his own home. He took Defendant to the garage so that Defendant “could get the rest of his money.”

On the way home, Adam saw the two Hispanic men standing outside the Baileyton Bar around midnight. When Adam arrived home, he called Defendant at the garage and told him where he had seen the men who purchased the vehicle. Adam stayed at his house the rest of the night.

Defendant had originally purchased the car he was driving when arrested, a 1974 Chevrolet Malibu, from another son, David, for one thousand (\$1,000.00) dollars, approximately one month prior to his arrest. In addition to repairing vehicles, Defendant bought and sold vehicles at his garage. Prior to purchasing the Malibu, the two Hispanic men had been to the garage looking at cars which were for sale. Defendant identified a bill of sale reflecting the purchase of the Chevrolet Malibu. The bill of sale stated the purchase price, type and year of vehicle, and the name of the purchaser "Carlos Avars." It was signed by Defendant, but was not dated. Defendant explained that it was not dated because "[h]e hadn't paid me all the money." The spaces on the bill of sale for listing the vehicle's serial number, motor number, license number, and title number were left blank. The balance of five hundred (\$500.00) dollars was owed on Friday, June 25, 2004. Defendant had not seen the Hispanic men since they had driven away with the car. When Adam arrived at Defendant's home on the night of June 25, Adam told Defendant that the car was parked at the garage with the keys inside the car. Defendant told Adam to take Defendant to the garage, which Adam did and then he left.

Defendant looked around outside the garage, but no one else was present. Adam called Defendant about twenty minutes later and said the Hispanic men were outside the Baileyton Bar. Defendant drove to the bar and looked inside and outside, but he did not see the men. Defendant drove to a trailer and some real estate he owned about one and one-half miles away to "check on it." He intended to then return to his garage to see if the Hispanic men "showed up there." After leaving the property, Defendant was headed back toward his garage when he was stopped by Officer Willett. Defendant testified that he had not opened the car's trunk or glove compartment on the night he was arrested, and in fact, had not seen the inside of the trunk or glove compartment in more than a week's time. Defendant told Officer Willett that he did not have a driver's license. Defendant suggested to Officer Willett that in lieu of having the car towed, Defendant could "get the old lady to come and get it." When Officer Willett requested consent to search the car, Defendant said "[w]ell, I don't know why, but yeah, go ahead, you know, it make [sic] me no difference, you know." Defendant testified that the marijuana and the handgun found in his car did not belong to him, and that he had never seen those items before the time of his arrest.

III. Analysis

Based upon the proof presented, the jury convicted Defendant of the misdemeanor offense of driving without a valid license, in addition to the two Class E felonies noted above. Defendant does not appeal the conviction for driving without a valid license. Defendant's challenge to the sufficiency of the evidence to support his felony convictions must be reviewed in light of well established law.

When an accused challenges the sufficiency of the evidence, this court must review the record to determine if the evidence adduced during the trial was sufficient "to support the finding by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence or a combination of direct and circumstantial evidence. *State v. Brewer*, 932 S.W.2d 1, 18 (Tenn. Crim. App. 1996).

In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. *Liakas v. State*, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). To the contrary, this court is required to afford the State the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *State v. Tuttle*, 914 S.W.2d 926, 932 (Tenn. Crim. App. 1995).

The trier of fact, not this court, resolves questions concerning the credibility of the witnesses, the weight and value to be given the evidence as well as all factual issues raised by the evidence. *Id.* In *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973), the Tennessee Supreme Court stated, "[a] guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State."

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982); *Grace*, 493 S.W.2d at 476.

With respect to the felony convictions, Defendant argues that there is no "credible proof" that he *knowingly* possessed the marijuana and the handgun, that there is "absolutely no evidence" that he possessed the marijuana with the intent to deliver it, and that there was no "credible proof" that he possessed the handgun with the intent to employ it in the commission of an offense. In support of his argument, Defendant asserts that the latent fingerprint found on the bag containing marijuana was not his fingerprint. Defendant argues that there was "sufficient proof" that he had no knowledge of the presence of the marijuana and the handgun. Defendant also argues that any possession of the marijuana would be without the intent to deliver it because no scales, empty baggies, records, or cash were found in the vehicle.

It is a Class E felony for a person to possess with intent to deliver not less than 14.175 grams nor more than 4,535 grams of marijuana. T.C.A. § 39-17-417(a)(4) and (g)(1). Tennessee Code Annotated section 39-17-419 provides that "[i]t may be inferred from the amount of a controlled substance or substances possessed by an offender, along with other relevant facts surrounding the arrest, that the controlled substance or substances were possessed with the purpose of selling or otherwise dispensing."

A bag of marijuana weighing approximately 390 grams was found in the trunk of Defendant's vehicle. Two other bags of marijuana, weighing a combined 55.3 grams, were found in the glove compartment. The total amount of almost one pound allows for a strong inference that the marijuana was possessed with intent to "deliver." T.C.A. § 39-17-417(a)(4). While quite obvious, it is still noteworthy that the marijuana was found inside Defendant's vehicle, an instrument commonly used for delivery of its contents. Possession of a controlled substance can be either "constructive" or "actual." To constructively possess a controlled substance, the person must have "the power and intention at a given time to exercise dominion and control over the . . . [the drugs] either directly or through others." *State v. Cooper*, 736 S.W.2d 125, 129 (Tenn. Crim. App. 1987) (quoting *State v. Williams*, 622 S.W.2d 121, 125 (Tenn. Crim. App. 1981)). Even if the possession of the drugs in the trunk and glove compartment of the vehicle driven by Defendant would not be classified as "actual" possession, it clearly meets the broad definition of "constructive" possession of controlled substances. Accordingly, the evidence was sufficient to sustain the conviction of marijuana with intent to deliver.

Tennessee Code Annotated section 39-17-1307(c)(1) provides in part that it is a Class E felony for a person to possess "any deadly weapon with the intent to employ it in the commission of or escape from an offense." The evidence at trial showed that Defendant was in possession of a deadly weapon, the revolver, during the commission of the criminal offense of possession of more than one-half ounce of marijuana with intent to deliver. The loaded handgun, obviously a deadly weapon, was found in Defendant's trunk strategically placed next to a large quantity of the marijuana. The proximity of this loaded weapon to the marijuana, and the fact that the weapon was in plain sight immediately upon opening the trunk, permits a reasonable inference that, if necessary, Defendant was prepared to use the gun to facilitate delivery of the marijuana or to protect his possession of the marijuana.

In *State v. James D. Dye*, No. M2002-01885-CCA-R3-CD, 2003 WL 22999447, (Tenn. Crim. App., at Nashville, Dec. 23, 2003), *perm. app. denied* (Tenn. June 7, 2004), the defendant was convicted of two counts of aggravated assault through use or display of a firearm, and one count of possession of a deadly weapon with intent to employ it in the commission of an offense. *Id.* at *1. The proof showed that the defendant displayed a .45 caliber pistol during the commission of the aggravated assaults, and in addition had a .38 caliber revolver on his person and an assault rifle in his car. In affirming the defendant's conviction for possession of a deadly weapon with intent to employ it in commission of an offense, a panel of this Court stated:

In the instant case the defendant, during the commission of two aggravated assaults, displayed one weapon, a .45 caliber pistol. He also carried a .38 caliber pistol on his person, and had a rifle in his car. It is certainly reasonable to conclude that any or all of these weapons were possessed with the intent to use them, if needed, in the commission of the aggravated assaults of Ms. Walters and Mr. Stancliff.

Id. at *2.

Although not cited by Defendant, we are aware of a case in which a panel of this Court concluded that the evidence was insufficient to support a conviction of possession of a deadly weapon with intent to employ it in the commission of an offense. We find this case distinguishable from the case *sub judice*. In *State v. Brentol Calvin James*, No. M1999-02533-CCA-R3-CD, 2000 WL 1763686, at *1-2, (Tenn. Crim. App., at Nashville, Nov. 30, 2000) (no Tenn. R. App. P. 11 application filed), the defendant was arrested while talking to an individual who was working undercover with police in an effort to arrest the defendant for selling drugs. The police were monitoring and recording the conversation between the defendant and the undercover informant. During the conversation, the undercover informant became frightened that the defendant was “going for his gun” and indicated to the police that he was concerned for his personal safety. When the police intervened and arrested the defendant, they found a nine-millimeter handgun behind the driver’s seat of the defendant’s car. The conversation between the two men had taken place outside of the defendant’s car. No one observed the defendant moving toward his car where the gun was located.

The defendant in *James* was found guilty of possession of a deadly weapon during the commission of an offense *Id.* at *2. In reversing the trial court’s decision, this Court held that there was insufficient evidence to support the defendant’s conviction for possessing a weapon during the commission of an offense. Critical to this Court’s determination was the fact that the defendant did not commit a criminal offense while talking to the informant and when the defendant was in possession of the deadly weapon. Without a criminal offense during which to employ the weapon, the defendant could not be found guilty of possessing a firearm during the commission of an offense. *Id.* at 4.

A person can be in “constructive possession” of a handgun, whether a pistol or a revolver, just as that person can have “constructive possession” of controlled substances. See *State v. Killebrew*, No. W2003-02008-CCA-R3-CD, 2004 WL 1196098 (Tenn. Crim. App., at Jackson, May 26, 2004) (no Tenn. R. App. P. 11 application filed). As we have already found that the marijuana in the trunk was in “constructive possession” of Defendant, clearly the revolver was also in his “constructive possession.” Defendant is not entitled to relief on this issue.

CONCLUSION

After reviewing the briefs and the entire record, we affirm the judgments of the trial court.

THOMAS T. WOODALL, JUDGE